INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Contract provisions involved	2
Statement	2
Argument	8
Conclusion	12
Appendix	13

CITATIONS

Cases:	
Chicago & Santa Fe Railroad v. *Price*, 138 U. S. 185	8
Kihlberg v. *United States*, 97 U. S. 398	8
Martinsburg & Potomac R. R. Co. v. *March*, 114 U. S. 549	8
Merrill-Ruckgaber Co. v. *United States*, 241 U. S. 387	8, 11
Plumley v. *United States*, 226 U. S. 545	8
Ripley v. *United States*, 223 U. S. 695	8, 11
Sweeney v. *United States*, 109 U. S. 618	8
United States v. *Mason & Hanger Co.*, 260 U. S. 323, affirmed on rehearing, 261 U. S. 610	8
United States v. *McShain*, 308 U. S. 512	8

699779—46——1

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 99

R. H. CROWLEY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 27–30) is reported at 62 F. Supp. 887.

JURISDICTION

The judgment of the Court of Claims was entered on November 5, 1945 (R. 31). A motion for new trial was overruled on February 4, 1946 (R. 31). The petition for a writ of certiorari was filed on May 3, 1946. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

Whether, where petitioner entered into a contract with the United States which provided that certain questions of fact arising thereunder were to be decided by the Government's resident engineer and others by the contracting officer, subject in each instance to appeal to the head of the department, petitioner may recover by a suit in the Court of Claims on claims which depend upon determinations of fact made adversely to petitioner by the resident engineer and by the contracting officer, and which were affirmed on appeal by the head of the department.

CONTRACT PROVISIONS INVOLVED

The pertinent provisions of the contract and specifications involved are set forth in Appendix, pp. 13–18.

STATEMENT

On May 17, 1940, petitioner entered into a contract with the United States by which he agreed, for a consideration of $115,625, to furnish all labor and materials for the construction of 150 prefabricated buildings for use in Civilian Conservation Corps camps (R. 12–13). Work under the contract was to be completed by June 17, 1940 (R. 13). The petitioner did not complete performance, however, until July 13, 1940, and, pursuant to the contract (R. 9, 13–14), liquidated damages were assessed against him for 26 days' delay (R. 13). Upon completion of the

contract, petitioner was paid the contract price minus the liquidated damages, a discount, and a freight adjustment (R. 13, 24).

Work under the contract was to be performed pursuant to specifications, which were made a part of the contract by reference (R. 13), pursuant to which the lumber to be used for various parts of the buildings was to be of the grades therein set forth (R. 10–11). As found by the court below (R. 21):

> Within the same grades of lumber there will be a range of quality. All lumber No. 2 grade will not be of the same quality, but there are ranges within the grades, some of which will approximate high quality of the preceding grade and low quality of the next higher grade. Cutting operations, if properly conducted, would eliminate many defects in lumber by allowing varying qualities within the grade to be used in fabrication of different items required under the specifications without going outside the grade range set by the specifications.

Under the contract, disputes concerning questions arising thereunder were to be decided by the contracting officer, subject to appeal to the head of the War Department (R. 8; *infra,* p. 13), and the Government's resident engineer was to be "the interpreter" of the intent and meaning of the specifications, subject to a like appeal (R. 16; *infra,* pp. 15–16).

The specifications provided further (R. 18; *infra,* p. 17) that

> Irrespective of grading rules quoted, any materials having defects that would be obviously detrimental, either to the construction or for the use for which it is intended, will not be accepted in fabricated materials

and that (R. 16; *infra,* p. 16);

> Except it be otherwise specified, all materials shall be of the best quality of their respective kinds * * * In all cases where an article is mentioned in the specifications in connection with the words "best quality", "approved quality" or "equal to", the Resident Engineer shall decide what is the best quality and most suitable article to use, subject to appeal * * *"

The resident engineer arrived at petitioner's plant nine days after the commencement date of the contract (R. 18). At that time he rejected certain work that had been performed by petitioner prior to his arrival (R. 18). Thereafter, the resident engineer from time to time rejected other work of petitioner and rejected certain lumber purchased by petitioner for the purpose of the contract. The lumber purchased by petitioner was, the court below found, "in the grades called for in the specifications" (R. 15). The resident engineer did not require petitioner to furnish lumber of a higher *grade* than called for by the specifications, "but he declined to accept the lum-

ber without elimination of the knots, which under his interpretation of the contract specifications would lessen the strength of the fabricated panels", and he required a better *quality* of lumber to be furnished (R. 19–20). The court below found that "in view of the quantity of lumber to which the Resident Engineer objected", petitioner purchased lumber of a higher *grade* than called for by the specifications even though he was not required to (R. 20).

On June 12, 1940, petitioner protested to the Chicago Quartermaster Depot against the various rejections by the resident engineer, claiming that they were "arbitrary", and requested an extension of two weeks' time in which to complete performance of the contract. This request was denied by letter from the Chicago Quartermaster Depot (R. 24). On August 7, 1940, petitioner filed with the Quartermaster General a claim in the amount of $39,999.86 for extra labor and material furnished on demand of the inspector and remission of liquidated damages (R. 24). Thereafter, the contracting officer made and transmitted to petitioner special findings of fact, setting forth fully the reasons upon which the denial of extension of time, denial of refund of liquidated damages, and denial of extra compensation were based (R. 24). Petitioner then wrote to the Quartermaster General, "protesting the adverse decision of the Contracting Officer and the inter-

pretations of the Resident Engineer and taking exceptions to the Contracting Officer's findings of fact" (R. 24). The Quartermaster General treated this letter as an appeal (R. 24). On March 8, 1941, "the Secretary of War filed his findings of fact relative to the appeal * * * from the engineer's interpretation of the specifications as well as the appeal from the findings of fact of the Contracting Officer" (R. 25) and recommended that a nine-day extension of time and remission of liquidated damages for this period should be allowed petitioner (R. 25) because of the nine-day delay in the resident engineer's arrival at petitioner's plant (R. 18, 29). The Secretary of War further recommended that a credit of $336.91 be allowed petitioner for excess costs incurred by him in procuring mess table tops (R. 25), as required by the resident engineer, of a better *grade* of lumber than called for by the specifications (R. 20–21, 29).

On August 6, 1941, the General Accounting Office settled petitioner's claim by disallowing $34,459.79 and allowing it in the amount of $5,540.07, the latter sum comprising the excess costs incurred by petitioner in connection with the table tops and the remission of nine days' liquidated damages (R. 25). Payment of the allowed portion of the claim, however, was suspended on the theory that petitioner was "liable for payment of claim due to the United States

* * * arising out of default on prior contracts" (R. 25–26).

On March 12, 1942, petitioner brought this suit in the Court of Claims (R. 1–6) seeking recovery of its claim for $39,999.86 for extra costs and remission of liquidated damages, $328.90 for demurrage charges, and $10,000 profit (R. 4–6). The court found that the resident engineer, in requiring petitioner to make changes in certain work performed by him and in rejecting certain lumber, caused petitioner additional expense and delayed performance of the contract (R. 19); that the resident engineer was rigid in his inspection and rejection of a considerable amount of lumber and fabricated units (R. 21); that, while "his rejection of a considerable amount of lumber and fabricated units" was "unreasonable", the Resident Engineer acted under his interpretation of the specifications" (R. 21); and that some of the delay in performance was due to petitioner's "faulty workmanship" (R. 24). The court held that the question of the quality (as distinguished from the *grade*) of lumber used by petitioner was, under the specifications, "one of fact to be determined by the resident engineer" (R. 30) and that "we are unable to hold that the action of the resident engineer was so arbitrary as to imply legal bad faith" (R. 30). The court held further that the debt to the United States, on account of which the General Accounting Office had suspended payment

699779—46——2

of the $5,540.07 which the Secretary of War had found to be due petitioner, was not his debt, and entered judgment for petitioner for that amount "in accordance with the decision by the head of the department" (R. 30, 31, 25–26).

ARGUMENT

It has long been settled that where the parties to a contract have agreed that the contract or specifications are to be interpreted, or disputes concerning questions arising thereunder are to be determined by a specified person (who may or may not be an officer or employee of one of the contracting parties), the interpretations and determinations of that person are conclusive upon the parties to the contract and on the courts and may not be questioned absent a showing of bad faith or error so gross as to imply bad faith. *Kihlberg* v. *United States,* 97 U. S. 398; *Sweeney* v. *United States,* 109 U. S. 618; *Martinsburg & Potomac R. R. Co.* v. *March,* 114 U. S. 549, 553; *Chicago & Santa Fe Railroad* v. *Price,* 138 U. S. 185; *Ripley* v. *United States,* 223 U. S. 695, 704; *Plumley* v. *United States,* 226 U. S. 545, 547; *Merrill-Ruckgaber Co.* v. *United States,* 241 U. S. 387, 393; *United States* v. *Mason & Hanger Co.,* 260 U. S. 323, affirmed on rehearing, 261 U. S. 610; *United States* v. *McShain,* 308 U. S. 512, 520–521.

The instant contract provided that the resident engineer was to be the interpreter of the intent

and meaning of the specifications (R. 16; *infra,* pp. 15–16); that the materials used were to "be of the best quality of their respective kinds" and that the resident engineer was to "decide what is the best quality" (R. 16, *infra,* p. 16); that "irrespective of grading rules", defective materials would not be accepted in fabricated materials (R. 18; *infra,* p. 17); and that disputes under the contract were to be decided by the contracting officer subject to appeal (R. 8, 29; *infra,* p. 13). Pursuant to the authority which petitioner and the Government had thus conferred upon him, the resident engineer rejected certain materials furnished by petitioner. Except with respect to the table tops, which are not here in issue, the resident engineer did not require petitioner to procure lumber of higher *grades* than set forth in the specifications (R. 19). He merely required petitioner to treat the lumber, *e. g.,* by removing knots, so as to improve its *quality* (R. 19–20). Such action by the resident engineer was clearly within his authority under the contract and specifications and, in the absence of a showing of bad faith, was conclusive upon the parties to the contract and on the courts. *Supra,* p. 8.

Petitioner asserts, however, that the resident engineer did act in bad faith. But the court below found against petitioner on this contention. It found that the resident engineer was rigid in his inspection of the lumber (R. 21, 29); that in his

rejections he "acted under his interpretation of the specifications" (R. 21); and that, while his action in this respect may have been "unreasonable" (R. 21), it was "not intentional" (R. 29) but rather was "attributable to his limited experience with the particular character of lumber * * * which was used on this project" (R. 21–22). Thus the court below had affirmatively found that the resident engineer's actions were not induced by bad faith. Had the resident engineer required petitioner to furnish lumber of a higher *grade* than that required by the specifications, as he did with respect to the table tops (R. 20; *supra*, p. 6), a different problem might be presented. But the court held there was no clear error in the resident engineer's requirement that the lumber furnished be of better *quality* than petitioner had procured (R. 29–30). As the court held, "the question of the quality of the materials [was] one of fact to be determined by the resident engineer" (R. 30). In the light of the plain provisions of the specifications that materials were to "be of the best quality of their respective kinds" (R. 16; *infra*, p. 16), and that the resident engineer was to "decide what is the best quality" (R. 16; *infra*, p. 16), the court below was clearly correct in refusing "to hold that the action of the resident engineer was so arbitrary as to imply legal bad faith" (R. 30).

Moreover, whatever may have been the limited experience of the resident engineer (R. 21–22), there is no finding or suggestion below that the contracting officer or the head of the department, to whom petitioner appealed from the resident engineer's decision, suffered from any such disability or acted in bad faith. Cf. *Merrill-Ruckgaber Co.* v. *United States,* 241 U. S. 387, 393. And petitioner had agreed that, upon such appeal, the decision of the head of the department would be "final and conclusive" (R. 8, 16; *infra,* pp. 13, 16).[1] Clearly "the contract did not contemplate that the opinion of the court should be substituted for that of" the head of the department. *Ripley* v. *United States,* 223 U. S. 695, 704.[2]

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[1] Petitioner urges (Pet., 10–14) that the court below inconsistently held that while the action of the resident engineer might have been so arbitrary under Article 12 of the contract and SC–5 of the specifications (R. 8, 16; *infra,* pp. 13, 15, 16) as to imply bad faith, the authority conferred upon him under Specification No. 2, Section I, paragraph 2A and SC–6 (R. 16–18; *infra,* pp. 16, 16–17) was such that it justified his actions. Whatever might have been the force of this objection had there been no appeal, the fact that the head of the department made a final ruling in the matter would seem to be dispositive of this contention.

[2] The court below denied petitioner recovery of the liquidated damages which had been assessed against him by the Government for failure to complete performance within the time specified by the contract (except with respect to so much of the claim for remission of liquidated damages as had been allowed by the head of the department (R. 25, 30)), and petitioner appears to have abandoned his claim for such recovery here. In any event, it is clear that petitioner could

CONCLUSION

The decision below is correct, no question of general importance is presented, and the controversy turns on questions of fact. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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JUNE 1946.

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be entitled to remission of liquidated damages only to the extent to which he was entitled to an extension of time for performance of the contract and that whether he was entitled to such extension was, under the contract, a question for the decision of the contracting officer, subject to appeal to the head of the department (R. 6–10). On petitioner's appeal from the contracting officer's adverse decision, the head of the department remitted liquidated damages for the nine-day delay in the resident engineer's arrival at petitioner's plant (R. 24–25, 29) and the amount of such remission was included by the court below in the judgment it awarded petitioner (R. 25, 30–31).

APPENDIX

CONTRACT PROVISIONS

ARTICLE 12. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer, subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties hereto. * * *

ARTICLE 15. *Alterations.*—The following changes were made in this contract before it was signed by the parties hereto: Article 5 deleted and paragraph captioned "Delays—Liquidated Damages" appearing on sheet 7 of Schedule of Supplies, is substituted therefor; * * *.

Delays—Liquidated Damages.—If the contractor refuses or fails to make delivery of the materials or supplies within the time specified, or any extension thereof, the actual damage to the Government for the delay will be impossible to determine, and in lieu thereof, the contractor shall pay to the Government, as fixed, agreed, and liquidated damages for each calendar day of delay in making delivery, *a sum equal to one-half of one per centum* (½ *of 1%*) *of the price of each incomplete unit* (one complete camp or complete group of supplementary buildings and materials intended for one camp will be considered a unit), *for each calendar day's delay after the*

date or dates specified for deliveries, and the contractor and his sureties shall be liable for the amount thereof: Provided, however, That the Government reserves the right to terminate the right of the contractor to proceed with deliveries or such part or parts thereof as to which there has been delay, and to purchase similar material or supplies in the open market or secure the manufacture and delivery thereof by contract or otherwise, charging against the contractor and his sureties any excess cost occasioned the Government thereby, together with liquidated damages accruing until such time as the Government may reasonably procure similar material or supplies elsewhere: Provided further, That the contractor shall not be charged with liquidated damages or any excess cost when the delay in delivery is due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God or the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, and delays of a subcontractor due to such causes unless the contracting officer shall determine that the materials or supplies to be furnished under the subcontract are procurable in the open market, if the contractor shall notify the contracting officer in writing of the cause of any such delay within 10 days from the beginning thereof, or within such further period as the contracting officer shall, with the approval of the head of the department or his duly authorized representative, prior to the date of final settle-

ment of the contract, grant for the giving of such notice. The contracting officer shall then ascertain the facts and extent of the delay, and extend the time for making delivery when in his judgment the findings of fact justify such an extension, and his findings thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned or his duly authorized representative, whose decision on such appeal as to the facts of delay and the extension of time for making delivery shall be final and conclusive on the parties hereto.

SPECIFICATIONS

Specifications CCC No. 2, Special Conditions, provides as follows:

> SC–4. *Inspection of the Work.*—The work is entirely under the control of The Q. M. G. and he or his authorized representative may have access to the same at all times. It is contemplated that inspection will be made continuously by a representative or representatives of the U. S. These inspectors may be stationed at the Contractor's plant during the period of fabrication, and all reasonable facilities will be furnished said inspectors for the purpose of assuring themselves that the details of the drawings and the provisions of the specifications are complied with.
>
> SC–5. *Interpretation of Contracts.*—Unless otherwise specifically set forth, the Contractor shall furnish all materials, labor, etc., necessary to complete the work according to the true intent and meaning

of the drawings and specifications, of which intent and meaning the Resident Engineer shall be the interpreter, except as otherwise provided in this contract, subject to written appeal by the Contractor within 30 days to the head of the Department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties hereto. In the meantime, the Contractor shall diligently proceed with performance. Except when otherwise indicated, no local terms or classifications will be considered in the interpretation of the contract or the specifications forming a part thereof.

SC–6. *Quality of Materials.*—Except it be otherwise specified, all materials shall be of the best quality of their respective kinds. Where two or more varieties of materials are specified for any purpose, it shall be optional with the Contractor which is used, but in any one instance the same material must be used throughout for that particular purpose. In all cases where an article is mentioned in the specifications in connection with the words "best quality," "approved quality," or "equal to," the Resident Engineer shall decide what is the best quality and most suitable article to use, subject to appeal provision included under paragraph SC–5, above.

Specifications No. 2, Section I, Specifications for Materials, paragraph 2A, provides as follows:

All softwood shall conform to Federal Specification MM–L–751a, and all hardwood lumber shall conform to Federal Specification MM–L–736 as to general instructions and specific requirements as amplified herein.

NOTE.—*Fabricated Units.*—All lumber, including the three classes, boards, dimension, and finish flooring, purchased by the bidder for use in fabricating the various units of the different camp buildings shall not be lower in grade than that specified for each class of material. After fabricating, each piece shall be subject to the further restrictions as to knots, shakes, crooks, and other defects specified for each class, especially shakes or splits in any piece intended for roof trusses, joists, and rafters. (See Par. 2–B for Specific widths of boards permitted.) Irrespective of grading rules quoted, any materials having defects that would be obviously detrimental, either to the construction or for the use for which it is intended, will not be accepted in fabricated materials.

Specifications CCC No. 2, Special Conditions, paragraph SC–12, provides:

SC–12. *Inspection and Acceptance or Rejection of Work.*—The Contractor must understand that all materials, built-up sections, etc., delivered by him prior to final acceptance and payment for same, shall be subject to the inspection of The Q. M. G., or his authorized agent, with full right to accept or reject any part thereof, and that he must, at his own expense, within a reasonable time remedy any defective or unsatisfactory materials, and that in event of his failure to do so, after notice, the C. O. shall have full right to have same replaced and to deduct the cost thereof from any money due to the Contractor. The Resident Engineer may require the removal of rejected material from the site of the work.

Authorized agents of the United States, other than those designated by the Contracting Officer, shall be given full opportunity to inspect materials, built-up sections, etc., at any and all times.

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